harm. Unlike *Farmer*, *Bradley* focused on the Fourteenth Amendment rights of a pretrial, suicidal detainee.

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Termination of Parental Rights

Psychologist Expert Testimony Allowed Regarding Future Ability to Comply With Conditions for Children's Return

In *In Re Daniel R.S.*, 706 N.W.2d 269 (Wis. 2005), the Supreme Court of Wisconsin considered whether a trial court erred in excluding specific testimony from a mother's single expert witness. The court found that the defense's expert psychologist should have been allowed to respond to queries regarding the mother's future ability to comply with Brown County's conditions for custody of her children, as the county's expert social workers had been.

Facts of the Case

Darell, 4, and Daniel, 3, were removed from their mother Shannon's care in infancy by child protection services, related to their older sister's death of dehydration and hyperthermia. The room temperature had been 98 degrees with the thermostat turned up. The mother and father had merely observed Tianna from her bedroom door in the 17 hours before her death.

Conditions for return of the children specified in the protective services order included maintenance of suitable housing and employment for three months, compliance with visitations, meetings with Human Services, individual counseling, psychological evaluation, budget counseling, and cooperation with probation without further legal violations. The father had not contested termination of his parental rights.

Brown County sought termination of parental rights, alleging that the children had been outside Shannon's home for over 6 months, she had failed to meet the conditions established, and there was a substantial likelihood that she would not meet the conditions within the following 12 months. Two expert witnesses (a Tribal Judge and one of Shannon's social workers) testified on behalf of Brown County. Each opined (without objections) that Shannon was not able to meet the required conditions within 12 months. The Tribal Judge, himself a social work professor, had not interviewed her or observed the children, but based his opinion on past behavior. A single psychologist, Gerald Wellens, PhD, completed an interview, record review, and psychological testing and testified on Shannon's behalf. After objections, Dr. Wellens was precluded from opining whether Shannon was able to meet the conditions. The jury found grounds to terminate Shannon's parental rights, as she neither had, nor would within 12 months, meet the required conditions for the return of her children.

The central issue on appeal was whether the circuit court erred by excluding opinion testimony of Shannon's expert witness regarding the substantial likelihood that she was able to meet the conditions established for safe return of her children within a 12-month period. Her appeal was also predicated on the higher standard of proof required by the Indian Child Welfare Act and on unreasonable delay. The appeals court rejected the mother's arguments, affirming the order of termination, and Shannon further appealed.

Ruling and Reasoning

The Wisconsin Supreme Court ruled that the circuit court erred by not applying the proper legal standard to the admissibility of the psychologist's testimony. The circuit court failed to consider that courts customarily allow psychologists to opine about future behavior, such as in dangerousness and sexual predator cases. The court found that Shannon's only expert's opinion testimony was central to her defense against termination of parental rights and should have been allowed.

Though the court was "reluctant" to delay permanent placement, they took into account the mother's constitutional rights and the possibility that placement with the mother might be in the children's best interest. The Wisconsin Supreme Court reversed and remanded the case for further consistent proceedings.

Dissent

The dissent argued that the majority opinion's recognition of the children's best interests

> . . . are hollow words that are belied by the lack of any reasoning that explains why Darell's and Daniel's best interests will be served by the possibility of an eventual return to Shannon at some unspecified time, rather than by a permanent home now where each little boy will have a chance to develop to his fullest potential.

The children had been out of Shannon's home for more than three years, their need for a permanent home ignored. Shannon had known the tasks requisite in regaining custody since 2001.

The dissent noted the majority's opinion was based on an evidentiary ruling preventing Shannon from obtaining one answer from one witness over a three-day trial to a question that had been asked and answered in a slightly different manner. Dr. Wellens was permitted to respond regarding whether there were "any psychological impediments that prevent her from completing any of the conditions that are listed." His response was "no"; the jury could have inferred that it was substantially likely that Shannon would meet the conditions. Finally, while a defendant in a criminal case has a right to present a defense, the mother was not a criminal defendant; rather, the termination proceedings were civil.

Discussion

The Wisconsin Supreme Court aptly did not agree with the trial court that only social workers were qualified to offer opinions predicting ability to comply with conditions for return of children. Psychologists routinely offer testimony regarding opinions of violent recidivism, applying scientific data consistently correlated with violence (*Barefoot v. Estelle*, 463 U.S. 880 (1983)), as well as utilizing risk instruments designed specifically to address violence potential. The contested psychologist testimony in this case was not about violence prediction, but rather the likelihood that a mother will be able to complete her case plan. Risk instruments, anchored in the behavioral sciences literature (see e.g., Stowman S, Donohue B: Assessing child neglect: a review of standardized measures. Aggress Violent Behav 10:491–512, 2005) are also available to assist the forensic examiner regarding the risk for abuse and neglect.

In this case, the prediction question was of importance because the Wisconsin law on involuntary termination of parental rights (Wis. Stat. § 48.415 (2001)) requires one of various conditions to be present, including such factors as the continuing need for protection or services (including a six-month period of placement outside the home, during which the parent fails to meet the conditions established, and when there is a substantial likelihood that the parent will not meet the conditions within nine months), failure to assume parenting responsibility, commission of a serious felony against one's children, and homicide. Within the continuing need for protection or services factor, the court must be convinced that the parent not only does not currently possess appropriate parenting skills or ability to protect the child from abuse or neglect, but also that the parent does not have the capacity or the willingness to do so in the allotted time frame.

The court considers the ability to provide appropriate supervision and protection and not engage in neglect or abuse as displaying adequate parenting abilities (a very low threshold). Therefore, adequate parenting can simply mean provision of adequate housing in a physically and emotionally safe environment, medical care, and school enrollment. For example, failure to maintain or obtain employment indicates a general propensity toward irresponsibility and lack of commitment, and also is relevant to the ability of the parent to provide basic necessities. Brown County's conditions for return of the children were developed to assist parents in meeting these basic standards. Failure to follow the conditions (assuming the parent has the ability to) brings into question a parent's interest and commitment to the child and the child's most basic needs. A child fatality related to neglectful supervision may well indicate a lack of ability or willingness to care for the child appropriately.

In *Santosky v. Kramer,* 455 U.S. 745 (1982), the U.S. Supreme Court decided that "clear and convincing evidence" is the minimal constitutional standard in termination of parental rights cases, though in Native American cases the standard may be "beyond a reasonable doubt." Since the severing of parental rights may be the ultimate punishment of a parent, a higher standard than the civil standard of "preponderance of the evidence" is appropriate.

As the dissent noted, time is of the essence for the sake of the children. Disruption of the placement process can make permanent placement more difficult, and disruption of a current attachment bond with the foster family for possible return to an am-

bivalent parent is not an optimal solution. Although the mother had a previous child fatality and had not followed the conditions for return of her children for several years, in this case the Supreme Court remanded the case to allow the respondent's expert witness to proffer testimony regarding the mother's future ability to meet the conditions.

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Sexually Violent Predators Laws

Sexually Violent Predator Testimony Is Not Novel Science Subject to a Frye *Hearing*

In *Commonwealth v. Dengler*, 890 A.2d 372 (Pa. 2005), Harry Dengler appealed the trial court's finding that he was a sexually violent predator (SVP). He argued that the court should not have admitted the opinion testimony of an expert witness psychologist before subjecting her testimony to the Pennsylvania test of admissibility for novel scientific testimony derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Supreme Court of Pennsylvania affirmed the trial court and superior court and held that SVP expert opinion testimony was not novel science and therefore not subject to a *Frye* hearing.

Facts of the Case

As part of a plea bargain, 34-year-old Harry Dengler pleaded guilty to aggravated indecent assault and corruption of minors after an incident with his 12-year-old niece in which he fondled and kissed her breasts through her clothing, fondled and inserted his finger into her vagina, and performed oral sex on her against her protests. The trial judge ordered the State Sexual Offenders Assessment Board to perform a Sexually Violent Predator (SVP) assessment under Megan's Law II. The Act defines the term "sexually violent predator" as a person convicted of a sexual offense and likely to engage in predatory sexually violent offenses due to a "mental abnormality" or "personality disorder" (42 Pa. Cons. Stat. § 9791 et seq. (2000)). The Act further outlines specific factors to be considered in the determination of a defendant's SVP designation; however, the Act does not limit the analysis to these factors.

The State Sexual Offenders Assessment Board issued a report prepared by Board member Veronique Valliere, a licensed psychologist. Mr. Dengler declined to be interviewed by a board investigator. Dr. Valliere completed her assessment by relying on available records, including court records in the case: the probable cause affidavit and court records relating to two prior sexual offenses. Dr. Valliere opined that Mr. Dengler met the criteria for classification as an SVP based on her experience and a review of the factors listed in the Act, such as "the research, his behavior, his past records, [and] his previous diagnoses."

Under extensive cross-examination, Dr. Valliere conceded that statutory terms, including "mental abnormality" and "sexually violent predator" were not diagnostic terms in psychiatry or psychology. Further, she conceded that there was no specific test to determine SVP status. Based on Dr. Valliere's testimony, the court found Mr. Dengler to be an SVP and sentenced him to prison and probation. In addition, on his release from prison, he was to comply with the registration provisions of Megan's Law II.

Ruling and Reasoning

Mr. Dengler appealed. The superior court unanimously affirmed the trial court, stating that it would defy logic to ask an expert witness to apply Megan's Law II in conducting an assessment and then exclude the expert's testimony merely because she employed Megan's Law II language in her assessment. Further, they said that psychological or psychiatric testimony offered at an SVP hearing was not novel scientific evidence subject to *Frye*.

The Supreme Court of Pennsylvania granted further discretionary review to provide guidance on this issue of first impression. Mr. Dengler argued that Dr. Valliere had based her testimony on statutory terms not generally accepted or having clinical meaning in